UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

RYAN MOORE, Plaintiff, v. UNITED STATES OF AMERICA and DOES I THROUGH 25, INCLUSIVE, Defendants.	)	No. 15-CV-0075-LAB March 1, 2017 1:21 p.m. San Diego, California

TRANSCRIPT OF BENCH TRIAL - DAY TWO
BEFORE THE HONORABLE LARRY ALAN BURNS
UNITED STATES DISTRICT JUDGE
(Afternoon Session, 1:21 to 3:20 p.m.)

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TESTIMONY:

EXHIBITS:

(None marked and/or admitted)

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SAN DIEGO, CALIFORNIA, MARCH 1, 2017, 1:21 P.M.

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(Proceedings resume following the lunch recess.)

THE COURT: All right. Counsel and the parties are here.

01:21

The plaintiff may call its next witness.

MR CHAMBERS: Your Honor, we would like to call Nancy Markel.

THE CLERK: Can you please raise your right hand.

01:22

(Oath administered.)

THE WITNESS: I do.

THE CLERK: Thank you. Please take a seat, and please speak into the microphone at all times. Can you please state and spell your first and last name for the record.

01:22

THE WITNESS: Nancy, N-A-N-C-Y, Markel, M-A-R-K-E-L.

NANCY MARKEL,

DIRECT EXAMINATION

BY MR CHAMBERS:

Q. Good afternoon, Dr. Markel.

01:22

A. Good afternoon.

Q. You are a neuropsychologist.

A. I am.

Q. Can you tell us how that differs from an ordinary psychologist?

01:22

A. Well, we get the same training as a regular psychologist,

but we then go onto advance training in brain functioning and the relationship between the brain and behavior, and we do more exhaustive training in that testing and interpreting the testing data and in understanding what behavior may be driven by brain functioning.

Q. What sort of specific experience do you have treating brain injury patients?

A. I did all my post-doctoral hours in neuropsychology, and I worked in that field for many years, and then for 11 years specifically I worked at Sharp Rehabilitation Center, which is an acute inpatient rehab center as well as an outpatient center for people who have undergone traumatic brain injuries, including brain injuries.

Q. In this case you were tasked with performing a neuropsychological evaluation of Mr. Moore.

A. That's correct.

Q. And you spent a couple days doing that?

A. Two days.

Q. Do you recall when that was?

A. I believe it December of 2015, December 1st, December 3rd.

Q. What is a neuropsychological evaluation?

A. Well, depending on the case and the patient and the presenting problems, it usually consists of doing a very careful history taking and record review of -- specific in this instance, hospital records and other records that were --

MR CHAMBERS: We lost the mic.
THE COURT: I may have done it. I think I touched it. I was trying to clean the screen off.
I'm sorry, doctor. Try it now.
01:24 THE WITNESS: Can you hear me? I can speak loud. I've emptied a room before. I have never quieted it.
THE COURT: Again, I apologize. I was trying to clean the dirty screen off and I must have pushed the button.
Go ahead.
01:24 THE WITNESS: Where was I?
BY MR CHAMBERS:
Q. You were in the midst of explaining what a neuropsychological evaluation entails?
A. Consists of history taking, record reviews, the performance
01:24 and administration of various tests, the scoring of those tests, the interpretation of those tests. That is just the barebones of a neuropsychological evaluation.
Q. We'll dig into it here in a minute, but during your history taking and the administration of your tests over the course of
01:25 those two days, did you have validity measures and truthfulness measures and all that built into your testing?
A. Yes, imbedded into any comprehensive neuropsychological evaluation are measures of a person's ability to give good effort during testing because the one thing you want know when
01:25 you are interpreting the test scores is this a person's valid

responses to these tasks, or are they trying to exaggerate or feign problems that they may not have.

So there is some measures that we call stand-alone measures, that is, that is all their intention is to do looking at effort, and there are what we call embedded measures, that are measures that are embedded within other forms of a test and parse out whether a person is giving good effort.

Those were administered intermittently over the course of the two days. Mr. Moore passed every single one of them.

Q. Did you find him to be truthful both on your history and testing?

A. He was very forthcoming. He was very truthful both in the history taking and the test taking and in discussing his past. I mean, he was volunteering information that I hadn't even know to ask. For instance, during the history taking, he informed me of an accident that had occurred several years before, the one that brought him to my office in which he had been -- had to go to trial on that and explained what happened there, so I found him to be a very forthcoming and upstanding in terms of giving me valid information.

Q. All right. Well, let's turn to your testing then. There are binders behind you. If you would prefer a paper copy of your report, I am happy to bring it up on the screen.

Why don't we get it up 135 on the screen, please.

A. Which binder would I go to?

Q. It should have numbers. 135 is the exhibit number.
A. It was right there. Sorry.
Q. We can scroll up and down depending on what page you are looking at.
01:27 A. Can I turn the sound off then? Sorry.
Q. Why don't you tell us what you did.
A. Well, what I've done here is I just started out in my report talking about what brought him to be referred to me and then did a history based on what he was able to tell me, and
01:27 then I think from there I went into not just the background of what he could tell me about the accident which led to this evaluation but also about his background information, that is, his family background, history taking, and that sense.
And from there I then wanted to go and become more current,
01:27 okay, since can the accident what has happened, so he gave me the information regarding his current status, and included in that was a form I had him complete which is called the signs and symptoms form, which allows him to go through various aspects of functioning, cognitive functioning, emotional
01:28 functioning, behavioral functioning, pain functioning. That talks about what he perceived his abilities were before and what they are like after, so you can do a comparison.
That has no validity measures on it. It is just his own self-report and his own perception of his ability or lack of
01:28 ability, and it was fairly consistent with everything else I

had seen in the records.
Q. All right. Well, why don't we move to your findings, and then you can kind of supplement and explain how you got there. What were your findings with respect to your neuropsychological
01:28 evaluation of Ryan Moore?
A. Well, this was interesting because two days of testing -- there were a lot of tests that were administered. You get a lot of scores. And at the end of the day when I went through everything and I looked at all the scores, there were just some
01:28 very what we call in my world lovely scores. They were average, above average. Anybody would be happy to have those scores.
But among the scores, there were a couple standouts that I found, okay, now this is unusual because it wasn't what I had
01:29 initially expected. One of the things that Mr. Moore had talked about in terms of some of his own complaints about what he felt his changes were included problems with memory, problems being slower in processing, some problems with word recall.
01:29 And when I looked at, for instance, some of the memory scores, they were remarkably strong. Now, the one thing I had to bear in mind was that Mr. Moore had just been tested one month prior to my evaluation. Many of the tests that I gave were the same tests that he had been given before.
01:29 One month is a very short time between testing and

retesting, so we have what we call practice effects, and there are certain areas that we expect will do better because a person has just done the same task a very few weeks ago.

Q. The person that performed the test a month before you, that was the defense expert?

A. That's correct, Dr. Evans. Where I could, I tried to use an alternate form, but many of our tests don't provide for that so you are stuck with what you have.

Be that said, there were certain consistencies both in my testing and Dr. Evans' testing that stood out, so one of the areas that showed up to have a strong component of a part of the brain functioning that we know is vulnerable to a brain injury is called processing speed.

In the general intelligence tests, there is a certain aspect of that test that measures processing speed. It was Mr. Moore's lowest score when he was tested by Dr. Evans, and it was a borderline level score. I think it came in at the 8th percentile, and his general intelligence was strong average, so that stood out as a very low score.

In my testing it was a little bit better, and that is because of practice effect. We expect that. We know in the literature it says people tested and retested on this may do better the second time. He did, but it was still his lowest score.

And then when you look at a way of measuring, okay, is this

lower score something that is unusual, or is it something that could just be a normal variant? In other words, people have individual differences. Some days they are better than other days. Well, one of the measures that measures that said that, wait a minute, no, this is very unusual. It happens very rarely in a general normative population.

So again, bing, that is a strike. You are looking at saying, okay, this is telling me that vulnerable area in the brain is weakness for him.

There were several others that stood out, and that is word recall. He did poorly for Dr. Evans. He did poorly for me.

Another area was attention. I looked at attention more thoroughly than Dr. Evans did. I gave some tests that were not administered to Mr. Moore in Evan's evaluation, and there were problems with visual attention and what we call vigilance. He was accurate on one test, but he was slow.

So that again is telling me, again, in order to be accurate he had to slow down. He wasn't as speedy as we would have expected. And he is being compared to people his own age and his own education. So this again was a stand out.

And one of the most striking things was something that is highly unusual and that is, his memory for stories. His memory for visual designs was very strong, but the unusual thing was his immediate memory was not as good as his delayed memory.

That is something we don't expect. We expect, you know,

your immediate memory, if I tell you a story and I ask you to tell it back to me immediately, I think that is going to be your best memory. If I wait, I do a delay, and in the neuropsychological world that is maybe 30 minutes, we expect
01:32 the delay to not be as good as your immediate because time should decay some of those memory traces.

But his delay was stronger. Both visually and verbally was stronger than his immediate. And I had to ask myself, why would that be? And the answer is clear. It is taking his
01:33 brain longer to consolidate information. Pathways that should have been there that would have been efficient for immediate memory weren't available, so his brain had to use other pathways to get it and consolidate it into memory, and that is why 30 minutes later it is stronger.

01:33 So, again, I am seeing consistencies in certain areas. I am seeing strange results, opposite what we would expect. And then on top of which I am seeing some emotional and some psychological issues that have a flavor in my clinical experience -- I've been doing this for 35 years -- that the
01:33 emotional response that certainly somebody whose undergone the trauma that he's undergone, I expect to have some emotional sequela.

I expect maybe some depression, maybe some anxiety, maybe post-traumatic stress disorder, but there was a flavor here
01:33 that there was a perception of something that had just a

distinct different quality to it.

And I am lucky to have lived long enough that we now have imaging studies that now can correlate, hey, what am I getting on testing and what are we seeing in brain imaging? When I looked at the brain imaging results, it made perfect sense to me. The areas of brain that were showing up to be abnormal were consistent with my findings.

They were consistent with the areas of the temporal lobe which we know, number one, has to do with areas of word recall. Okay, we have that on Evans and on mine. It has to do with emotional functioning, not just the reaction to an event, but the brain's capacity to deal with emotions. That is an injured part of Mr. Moore's brain, and that explains why the perception of this injury has a flavor for change different than just a normal reaction of depression. It is an organic injury. It is structural in the brain that has been hurt.

So on top of everything else, it exchanges the slowness of the processing. It explains why it takes the brain a little bit longer, and it will also explain why he is fatigued at the end of the day. He is putting everything that he has into being a good worker, but at the end of the day he is -- pardon the expression -- wasted. He's used up all his reserve.

He should be a healthy, you know, vibrant man in his close to 40s, and yet at the end of a workday he is wiped out and he has no energy left to do anything. On top of which he also has

very little motivation.

Well, one of the areas of his brain that has been impacted is the frontal lobes, and one of the things we know the frontal lobes orbits is are motivation, and that has been one of his
01:35 complaints, that he just doesn't feel motivated to do things.

So the combination of my test results linked with what I saw in the results of the imaging that sort of made sense and went hand in hand and it told me the picture of what has gone here and explained everything to me.

01:36 Q. And what was your ultimately diagnosis -- or diagnoses?

A. I used the new DSM-5 diagnostic criteria, and what I diagnosed was a mild cognitive disorder due to traumatic brain injury, and it was associated with other factors that I felt were also part of the brain injury, that is, major depression
01:36 which had already been diagnosed and was currently being treated; post-traumatic stress disorder that had already been diagnosed and was being treated; and anxiety disorder that was also being treated.

I didn't get into any of the physical injuries. That is
01:36 beyond my scope of expertise.

Q. And how were you able to arrive at that diagnosis with just the few tests that you mentioned being abnormal?

A. Well, I suppose that is one way of looking at it with just a couple tests that are abnormal, but that is not how -- that
01:36 is not how the diagnostic criteria work. You have to meet -- I

think in my rebuttal report I talked about the exact criteria that he met in terms of that diagnosis, that there was a decline in cognitive functioning that you could see both in neuropsychological testing as well as imaging, so he met those criteria. So that is the first hoop that you have to jump through to make the diagnosis of a mild cognitive disorder.

Then specific to the traumatic brain injury, we have the history of the injury. He had a blunt injury to his face, and we also know because of the experience of that it was also, I believe, a blast injury. And we know from our studies of the Iraqi War veterans who are coming up with blast injuries, it has opened up to the whole world of what is happening to a brain that has been exposed to forces.

So he has both I think a blunt as well as blast injury that is affected, which is why the external sheering injury that he has in the imaging why it is diffuse. It is all over the brain.

Q. And you've spoken with Dr. Lobatz?

A. Yes, I have.

Q. About Ryan's case?

A. Exactly.

Q. He has explained to you what you are explaining to us now from a neurologic standpoint?

A. We shared our data. I gave him my findings, and he shared what the imaging studies was, and they went together.

Q. So what about Ryan's history played into your diagnosis, if anything?
A. Well, up until this injury, from everything that I could tell and from the records that I've seen is that this young man
01:38 was on an upward trajectory. He had been the first in his academy for the Border Patrol. He ways doing quite well as an agent. His career goal was to become a criminal investigator, and his trajectory from everything that I could tell was headed straight in that area. This changed things.
01:38 Q. How did it change them?
A. Well, I don't know what the Border Patrol is like in terms of somebody who's had the kind of injury he's had, but in terms of just the psychological and psychiatric injuries that he has sustained, I don't know that that same trajectory is in his
01:39 future. I think he comes now with a history in which he's been injured. He's been hurt.
One of the things we know about somebody who's had this kind of brain injury is that an injured brain ages. It ages differently than a normal brain aging.
01:39 MR. COYLE: Objection, Your Honor, to the testimony the job trajectory. There has been no foundation laid that this witness knows anything about his ability to progress in the Border Patrol.
THE COURT: Sustained.
01:39 MR. COYLE: Motion to strike.

THE COURT: Yeah. The last portion of the answer to which the objection refers is stricken.

Next question.

BY MR CHAMBERS:

01:39 Q. During your history taking with Mr. Moore, did you discuss his career?

A. I asked him about his career and what his current career was and what his plans were for the future.

Q. And what did he explain to you in terms of that?

01:39 A. It had been his goal to become a criminal investigator for maybe another agency and that is what he was working towards.

Q. And from that information what did you deduce?

A. My -- again, as a neuropsychologist, I was questioning whether that was going to be possible if for no other reason

01:40 than the possibility of having to go into a job that would require a lot of new learning would be problematic for him.

Q. And Ryan is back to work now. You are aware of that?

A. Yes, I am.

Q. And he was back to work at the time of your evaluation?

01:40 A. Yes, he was.

Q. How in the world can somebody with a mild neurocognitive disorder due to traumatic brain injury be a functioning Border Patrol agent?

A. Good question. The one thing that I am aware of is that

01:40 the job that he is performing is one in which he has been

working at for many years, so it is not a new job. It is not a question of doing new learning.

The other thing that I am aware of, again, as a citizen not just a neuropsychologist is that I have to say that I have concerns about him having a gun and having to make split-second decisions. To my understanding, the kind of job that he is required to do right now is not a field job. He is basically at a desk working on a computer, which as a citizen makes me feel a little bit more comfortable.

01:40 01:41

However, even with that, what I am understanding from what I have been told, is that even that is more arduous for him because even when he is working on a computer, if he is going from some other information and has to transfer that to the computer, if he doesn't write it down, he can't remember it.

01:41

Again, that is telling us exactly what the test results showed and the imaging is showing is that it is not staying there. The memory isn't there.

Q. And, again, just so I am clear, you noted deficiencies with Mr. Moore's processing speed in your testing?

01:41

A. Absolutely.

Q. What kind of stuff would that affect?

A. So that requires -- the way it is measured is that it is an associative task in which your learning symbols and certain relationships to other symbols and how quickly you can do it,

01:41

and we had different measures of assessing that, and in both

measures he was slow. It wasn't that he was inaccurate. He was slower than what we would expect.

And on a completely different measure where he had to look at items and make decisions as to crossing out a certain item on a long process of two pages full of numbers and I just want you to cross out sixes, he was very accurate but he was very slow. That is processing speed.

01:42 It takes him longer, and that is why, again, if you look at the imaging, it is showing, look, those efficient pathways have been destroyed, so the brain is trying to work around it, sort of -- I am from New York. We have a subway system. We have express trains, and we have local trains. You can get to the same place if you take a local train as an express train. It just takes you longer. That is what he is experiencing.

01:42 Q. And he also had deficiencies in visual attention?

A. Yeah. That is the vigilance overtime. It takes him longer to be accurate, and again, that goes back to the processing speed. They are linked.

Q. And the word recall, is that what you were talking about

01:43 before about the stories?

A. Yeah, it -- no, it is a specific test that is looking at being able to remember the names of common objects. He took that test for both Dr. Evans and for me, and it was one of his lower scores. Again, that goes right back to the imaging of

01:43 the temporal lobe. That is what we call semantic language. It

is housed in the temporal lobe. That is where he has some of his damage.

Q. And you reviewed Dr. Evans' report in this case?

A. More than once.

01:43 Q. Okay. Are there any specific criticisms that you would like to point out?

A. I wrote a whole rebuttal about it, but to be succinct, I thought that Dr. Evans made light of certain of the findings. He ignored some of them. For instance, he mentions processing

01:43 speed, but never goes back there.

Uses the working memory score as an example of his great memory but didn't look at the other memory scores and explain in any way why is it his delay is better than his immediate and ignored other factors that were there and just were screaming

01:43 to be explained if no other reason but not ignored, including his exclusion that he had PTSD because he doesn't have memory for the event, which is no longer required in the DSM-5.

I am sure Dr. Koransky talked about that. But also not even seeing he has major depression. He diagnosed him as

01:44 having depressive order NOS. He made the criteria for major depression. I go through it painstakingly in my rebuttal.

So not only from the cognitive end did he not highlight specific areas that were attributable to brain injury but also not understanding that the temporal lobe injury is part of the

01:44 emotional injury, not from a reactive stand but from an organic

stand.
Q. So you are saying that a lot of what you are seeing in Ryan both from a cognitive standpoint and an emotional standpoint stems from a brain injury?
01:44 A. Yes.
Q. And you have also spoken with Doreen Casuto, who is a life-care planner?
A. I have.
Q. Can I see Exhibit 66, please.
01:44 Is this the report that you've seen?
A. Yes.
Q. If we can go to the next page.
A. Yeah. I see my initials on some of this.
Q. And you have reviewed this report that I am showing you
01:45 now, Exhibit 66?
A. Yes.
Q. And you had discussions with Doreen?
A. Yes.
Q. And you read Exhibit 66?
01:45 A. Yes.
Q. And the recommendations that are contained within Exhibit 66 are yours?
A. Absolutely, yes.
Q. Based on the ones attributable to your initials.
01:45 A. The ones with my initials are the ones that I gave my

opinion of what was needed.
Q. Did you see any errors in what recommendations ultimately made their way into the life-care plan?
A. No. I thought it was a very reasonable plan, at least from the end that I had anything to do with.
Q. You've talked a little bit about this being an organic brain injury centered type of injury. I am wondering what your thoughts are -- you know, obviously this lawsuit can be stressful. I am wondering what your thoughts are in terms of Ryan's longer term prognosis once this lawsuit is over?
A. You know, taking into account that a legal case -- I have not been in the position that Mr. Moore is in, that is, being the person here whose life is being investigated in a legal sense, that certainly that comes with stress. There is no question.
And that stress makes -- exacerbates other conditions, but that is not to say that once this portion of his life is over -- and it will be over one way or the other -- that his life will go back and have a normal sense again. He will never be who he was before this event in June of 2013, not just because of the physical injuries, but again, my expertise is brain injury.
It is the brain that I see that has changed, and he will not just be who he was before, and he will not just pick up the pieces and get on to a life that had been meaningful and a

career that had been one that he had chosen, he loved his work, that he will just pick it up and go right forward and happily dance on. It will not be the same.

His brain is not the same. It will not function the same from a cognitive end and from an emotional end. He will need treatment. He will need therapy. He will need a course of at least some cognitive rehabilitation to teach him the best strategies we can for making his brain work more efficiently, and he will also be aware that as he ages, his aging will affect the way the brain functions. It will decline differently than it might have declined had he not had this injury.

So the whole aspect of who he is as a person, because who are we as people? We're our cognitions, we're our physical sense, and we're our emotional sense. All of those factors of our functioning come from here, inside here, and it affects our work life, our recreational life, our social life, our relationships with others. That is who we are.

Well, that has changed for him, and he is -- for lack of a better term, he is going to have to reinvent himself, and he will need help to do that, and that is not to say that we won't do everything we can to make it as a constructive and purposeful life.

But to just think cavalierly that he will just be fine once this is behind him is naive, and actually it is a false -- it

is a false statement.

MR CHAMBERS: Thank you, Dr. Markel. I don't have anything further.

THE COURT: Cross-examination.

01:49 THE WITNESS: Is there -- may I get some water? Sorry. Thank you.

MR. COYLE: No problem.

CROSS-EXAMINATION

BY MR. COYLE:

01:49 Q. Good afternoon. Dr. Markel, is that how you pronounce it?

A. Markel, Markel, so long as it is not Marco.

Q. Okay. Good afternoon.

A. Good afternoon.

Q. Let's talk quickly about your qualifications. You are not

01:49 board certified by the American Board of Professional Psychology, are you?

A. No. I was -- show my age, which is when I got started, that was really just coming up on the board. What qualified you as a neuropsychologist and being able to label yourself was

01:49 what we called being a member of Division 40 of the American Psychological Association. In order to become a member of that, you had to show what your training, experience, and education was.

It was a conference that was known as the USIN Conference,

01:49 and in order to qualify for becoming a member of Division 40,

which is clinical neuropsychology, you submitted all of your criteria, all your background, everything that you needed, and they decided whether or not you qualified.

Back then that was the standard. If I were 20 years younger, I would go through board certification. At this point in my career it is not necessary.

Q. You are a neuropsychologist not a psychiatrist?

A. That's correct.

Q. So you can't prescribe medication?

A. That's correct.

Q. And so you have not treated Agent Moore?

A. No, I have not.

Q. Okay. Let's talk about your opinions. Now, you have two main opinions in this case. One is about Agent Moore's cognitive function, and the other is about his emotional function; right?

A. Well, I have an opinion regarding that, but I defer also to Dr. Koransky who was brought on as the expert to deal with the emotional functioning.

Q. Okay. So let's talk about -- well, first, it is because you believe Agent Moore has those cognitive and emotional problems that you think he is going to need future neuropsychological, psychotherapeutic, and psychiatric treatment; right?

A. Correct.

Q. And if he didn't have the problems, he wouldn't need the future treatment; right?
A. I would assume so.
Q. Okay. Let's now get into Agent Moore's cognitive function. Your opinion is that the accident with the tire caused Agent Moore to suffer a decline in cognitive function?
A. In certain areas.
Q. Specifically four areas of weakness; right?
A. Correct.
Q. And those are -- I am quoting from page 29 of your report, which is Exhibit 135 -- processing speed, visual attention, word recall, and specific areas of executive functioning?
A. Correct.
Q. And before we talk about the specific cognitive tests that you gave Agent Moore, when you are assessing a patient's cognitive function, do you also consider how the patient is actually functioning in the real world?
A. Yes.
Q. Is that important to your assessment, would you say?
A. Yes.
Q. Do you consider, for example, what the patient is doing for work?
A. Correct.
Q. What is your understanding of what Agent Moore is doing for work?

A. My understanding at the present time is he is more of an analyst and he is sitting at an office with a computer.
Q. So you have no understanding that he is out on a task force, carrying a gun, executing warrants, making arrests?
01:52 A. As of my knowledge at the present time he hasn't been doing that for quite a while.
Q. If he were doing those things, would that affect your opinion at all?
A. I think I said earlier that as a citizen I might be
01:52 concerned about the carrying of a gun, and I don't know what the Border Patrol's standard is or criteria are for the safety of that, but I would defer to them in deciding whether somebody was safe.
Q. I don't mean your opinion as a citizen but your opinion as
01:52 an expert witness assessing Agent Moore's cognitive function, would that affect -- if he were performing all those tasks without complaint, would that affect your opinion at all?
A. What I would do is I would also defer to his treaters to know because they would know him better on a daily or a work
01:52 more available record to know what is appropriate, so there are two prongs to my answer to you which is, one, his treaters would be probably a better source of that information. The Border Patrol also would be a better source of that information, and I can just tell you as a neuropsychologist I
01:53 would have concerns.

Q. Do you have any opinion about whether those kinds of tasks, carrying a gun, deciding whether to fire that gun, arresting people, participating in raids, do those kinds of tasks involve the use of cognitive skills like processing speed, visual attention, memory, and executive functioning?
A. Exactly, which is why I have concerns.
Q. Would you agree also that driving a car involves the use of cognitive skills, like processing speed, visual attention, memory, and executive functioning?
A. Sometimes it depends on what the driving is involved. It can impact all of those.
Q. If it is driving that involves surveillance of another vehicle, would that involve those skills?
A. You know, there is a specialization in driving evaluations for people who have had brain injuries, and there are actually experts in that, so I would defer to those experts.
Q. Okay. Are you aware of any reports about Agent Moore's driving records since the accident?
A. Yes, I am.
Q. What is that specifically?
A. There was an incident back that he was arrested for DUI.
Q. Anything besides that?
A. There was an incident that occurred back in 2009 before the accident.
Q. I am talking since the accident.

A. Since the accident, I am not aware of any.
Q. Let's talk now about the cognitive testing. You talked about it on direct examination, and let's talk about the four areas of weakness that you say you found.
01:54 Now, when you say weakness, that is different from saying he was actually impaired in those areas; correct?
A. Well, actually, I think the processing speed showed some impairment, and I think the word recall is an area of impairment.
01:54 Q. The other two areas, there is a difference between weakness and impairment?
A. Not necessarily because if I am remembering -- again, I don't have my report in front of me -- but I remember the specific areas of executive dysfunction. There was one area
01:55 that was I think below average or right on the borderline of below average or impaired.
And I think the world recall was in the same area. The processing speed was more impaired for Dr. Evans than it was for me, but that was because of the practice effect.
01:55 Q. Well, doctor, isn't it true that out of the more than 100 tests that you gave Agent Moore, only one of his scores actually fell in the impaired range?
A. You know, Dr. Evans used that same kind of analysis to take a look at some of Mr. Moore's scores saying that --
01:55 Q. Thank you, doctor. Can you just please answer first?

A. I'm sorry. What was your question?
Q. Out of the more than 100 cognitive tests that you gave Agent Moore, only one of his scores actually fell in the impaired range?
01:55 A. And would you point out to me which one you are talking about?
Q. We'll get into that later, but does that sound incorrect to you?
A. I know there were four areas, so I am not sure that only
01:55 one fell in the impaired area, so that is all that I am questioning on.
Q. So you don't know?
A. I don't remember.
Q. Let's talk about processing speed. Now, in the tests that
01:56 you are giving Agent Moore to measure his processing speed, essentially you ask the patient to perform a task that requires him to do some sort of mental processing; right?
A. Specific process, yes.
Q. And then the patient has to respond manually; correct?
01:56 A. Correct.
Q. Like with his hands?
A. It is a visual-motor task.
Q. So yes?
A. Meaning your eyes and your hand, and you are doing it
01:56 against the clock.

Q. So your tests aren't measuring pure processing speed, pure mental processing speed but also physical responses?
A. Correct.
Q. And, in fact, Agent Moore performed well on some of the processing speed tests you gave him?
A. He did?
Q. You are disputing that he did?
A. I am asking you because I don't recall any that he did that were measuring processioning speed.
Q. Let me direct you to page 24 of your report, which is Exhibit 135. It will come up on the screen. This is the D-KEFS motor speed test, and Agent Moore scored a scaled score of 11. A scaled score of ten is in the 50th percentile?
A. That's called motor speed. That is not processing speed.
Q. That doesn't involve any processing speed?
A. It is all per motor. There was nothing that his brain had to process to perform that. He didn't have to mitigate anything inside the brain to do anything. All he had to do there was trace a line, over a dotted line.
Q. That requires no cognitive --
A. It is pure motor. It has nothing to do with an associative process that goes on between the motor and some other brain function which is what the processing speed tests measure, so it is not measuring the same thing.
Q. You also gave Agent Moore other timed tests; correct?

A. Yes.
Q. And since they were timed, they would also tell you something about his processing speed abilities, even if that wasn't their primary purpose, right?
01:58 A. They could be, yes.
Q. So, for example, you gave Mr. Moore, on page 23 of your report, WAIS-4 arithmetic test?
A. Yes.
Q. And on that test, Mr. Moore has 30 seconds to answer each
01:58 question; right?
A. Yes.
Q. And it is a purely verbal test. There is no manual component to that one; right?
A. Correct.
01:58 Q. And on that test Mr. Moore scored at the 84th percentile; correct?
A. Right.
Q. That is the high average range; right?
A. Yes. But that is not --
01:58 Q. You also gave --
A. Excuse me. But if you are trying to make the point that that is processing speed, it is not.
Q. Thank you, doctor. I am just asking you the question.
A. Okay.
01:58 Q. You also gave Agent Moore a visuospatial matrix reasoning

test on page 23 of your report.
A. It is covering it, but --
Q. I'll pull it up here.
A. There it is.
01:59 Q. And that is also a time test; correct?
A. I don't think matrix reasoning is.
Q. You are testifying it is not a timed test?
A. Locked design, which is in that same area, is timed, and visual puzzles is timed, but I don't think matrix reasoning is.
01:59 He gets as much time as he wants.
Q. Okay. Let's talk about visual attention. On page 22 of your report, you gave Agent Moore the WMS-4 visual working memory test; correct?
A. Correct.
01:59 Q. And visual working memory is a measure of visual attention; correct?
A. Partially.
Q. And Mr. Moore scored in the 79th percentile on the test?
A. Correct.
02:00 Q. That is the high average range?
A. Correct.
Q. Let's talk about word recall, the third area of weakness that you said you found in Agent Moore. On page 24 of your report, you gave Agent Moore the California verbal learning
02:00 test?

A. That's correct.
Q. In fact, that is the only word recall test you gave to Agent Moore; right?
A. That's right.
02:00 Q. And essentially with that test, you read the patient 16 words, and then you test to see how many of those words the patient can remember?
A. Correct.
Q. And then the results are reported in this right column what
02:00 are called Z scores?
A. Well, some of them are Z scores, and some are T scores, but yes.
Q. I see. With the Z scores, looks to be all but the first of those scores; right?
02:00 A. Yes.
Q. A score of zero means that the patient is right at the 50th percentile; correct?
A. That's right.
Q. And a score of one means that they are one standard
02:01 deviation above the median?
A. The mean.
Q. The mean. Okay. And a score of minus one or negative one means the patient scored one standard deviation below?
A. Correct.
02:01 Q. One standard deviation is about 15th percentile points?

A. 16th.
Q. So a score of one means the patient scored in the 65th or 66th?
A. I'm sorry. Score, if you are one standard deviation above the mean, you are 84th percentile.
Q. One standard --
A. It goes 16 points upward or down. So 50 -- I'm sorry. Go ahead. I'm sorry. I was thinking something else.
One standard deviation -- go ahead -- is up or down 15 points.
Q. So, again, if the patient scores in the 65th percentile -- or scores --
A. No.
Q. -- scores a one, that would be approximately 65th or 66th percentile?
A. Correct.
Q. Now, none of Agent Moore's scores on this California verbal learning tests were impaired, were they?
A. No.
Q. In fact, all 24 of his scores were at or above the 35th percentile?
A. Correct.
Q. Now, let's talk about the fourth area of weakness that you say --
A. This is not an area of weakness that I said he had, so if

you are trying to imply --

THE COURT: Excuse me, doctor.

THE WITNESS: Sorry.

THE COURT: Don't volunteer anything. He'll ask you a question. Answer his questions.

Go ahead. Next question.

BY MR. COYLE:

Q. Let's talk now about the fourth area of weakness you said Agent Moore showed executive functioning. You gave Agent Moore 22 tests that were dedicated to measuring executive functioning?

A. I didn't count them, but it is possible.

Q. Does that sound; right?

A. It is probably within the ballpark.

Q. All right. I am going to show you page 26 of your report, Exhibit 135 again.

A. Yes.

Q. These are the results from the executive functioning tests you gave, and the results are reported in what is known as a scaled score; correct?

A. Yes.

Q. I think we mentioned it before but a scaled score of ten is right in the middle at the 50th percentile, right?

A. Average, yes.

Q. And a score of seven or higher is considered not impaired?

A. Seven is right at the cutoff.
Q. And above --
A. So eight -- between 8 and 12 is considered average. Anything below eight is going below average.
02:03 Q. And seven is not considered impaired; correct?
A. It is considered below average.
Q. I understand that. I am asking about impaired.
A. No.
Q. And Agent Moore's scaled scores were seven or higher on 21
02:03 of the 22 executive functioning tests you gave --
A. Correct.
Q. -- correct?
You also gave Agent Moore other tests that indirectly measure executive functioning, even if that wasn't the primary
02:03 purpose; correct?
A. Well, some people would say some of the measure executive functioning indirectly. I am not sure I do.
Q. Okay. Well, you gave him, for example, the WAIS-4 test on page 23 of your report?
02:03 A. That's the similarities test. It is verbal abstract reasoning.
Q. Does that test measure executive functioning?
A. Not from my standpoint. That is measuring the kind of abstract thinking.
02:04 Q. I understand.

A. Some people do. Some neuropsychologists do. I don't particularly find it a good example of executive functioning.
Q. And on that test Agent Moore scored at the 50th percentile?
A. Correct.
02:04 Q. And you also gave him the WAIS-4 matrix reasoning test on page 23 of your report?
A. Yes.
Q. And that test measures executive function?
A. Again, some people use that as a measure of executive
02:04 functioning. I particularly don't find it a test that I would use for executive functioning. That is why I use other tests.
Q. Agent Moore scored in the 91st percentile on that test?
A. He did.
Q. Now, let's talk about Mr. -- Agent Moore's reports to you
02:04 of memory issues. Totally apart from the cognitive tests that you gave him, he told you that he's had some memory problems since the accident; correct?
A. Yes.
Q. And those are self-reported. He told you that. There is
02:05 no other way besides the cognitive tests for you to check that; right?
A. That's right.
Q. Now, your cognitive testing didn't show any systemic memory deficits, did it?
02:05 A. What do you mean by systemic?

Q. In multiple areas, across multiple tests?
A. No. I think the thing that I pointed out that his delay was better than his immediate.
Q. When you say his delay is better than immediate, you are talking relatively; correct?
A. Yes.
Q. So he performs -- compared to other people who have taken the tests, he does better on the delayed than the immediate; correct?
A. That's right.
Q. You are not saying absolutely he is remembering things that he didn't remember before?
A. He is remembering more things than he was able to tell immediately.
Q. Relative to other people who took the test?
A. Relative to himself. In other words, if he had a scaled score of 15 immediate and a scaled of 19 after, that is relative to himself.
Q. Those are scaled scores compared to everyone else who took the test?
A. I am comparing him to the normative population, so in other words, the immediate scores compared to other people his age and his -- I think this one is only age, so he's compared to other people his age.
Then also the delayed is also relative to other people his

age, so everything is the same, to age.
Q. Now, let's talk about the specific memory test that you gave. On page 22 of your report you gave the WAIS-4 working memory test?
02:06 A. Yeah.
Q. And he scored in the high average range on that test, the 77th percentile?
A. Correct.
Q. You also gave him on page 22 of your report, the WMS-4
02:06 visual working memory test?
A. Yes.
Q. And also he scored in the high average range on that test?
A. Correct.
Q. You gave him, on page 25 of your report, the WMS-4 auditory
02:07 memory index?
A. It is two tests. It is the auditory memory. It is logical memory 1 and 2, and these were tests that he had been given a month previously, but he had the same pattern, which was stronger scores on the delay than on the immediate.
02:07 Q. And in both of these he was in the very superior range; correct?
A. Exactly.
Q. In fact, he scored in the 99th percentile on one of them right?
02:07 A. Yes.

Q. That is the highest possible score you can get?
A. About, yes.
Q. You can't score in the 100th percentile; correct?
A. Correct.
02:07 Q. All right. Let's talk about what you think was the cause of these areas of weakness. Now, you would admit that depression, anxiety, and stress can affect a person's cognitive functioning; correct?
A. Yes.
02:07 Q. Yet you ruled out those alternative causes in this case because of the pattern that you say you observed in Mr. Moore's cognitive results; correct?
A. Yes.
Q. Specifically you think that Agent Moore's pattern of
02:08 results is more consistent with a mild traumatic brain injury than with emotional problems?
A. Yes.
Q. Okay. Now, we talked about your opinions about Mr. Moore's cognitive function. Now, are you deferring to Dr. Koransky on
02:08 Mr. Moore's emotional functioning?
A. No. I have it in as my diagnoses as well.
Q. Okay. So now you think he's got post-traumatic stress disorder; correct?
A. I do.
02:08 Q. And the basis for that opinion is his test results on the

Trauma Symptom Inventory 2; correct?
A. Among them, yes.
Q. And that test relies entirely on the patient's self-reports; right?
02:08 A. Correct. It also has validity measures in it.
Q. It uses suggestive questions; right?
A. It has statements, not questions, in which the patient endorses yes or no or a scale.
Q. Yes. So it asks, for example, how often in the past six
02:09 months you've experienced nervousness?
A. I don't know if that is one of the items, but something like that.
Q. Or how often in the past six months have you experienced sadness?
02:09 A. Correct.
Q. What were Agent Moore's validity scale scores on that test?
A. He -- I'll have to look at my report, but he was -- they were valid scores.
Q. Your report doesn't list the actual scores. What were
02:09 they?
A. If you want, I have my briefcase outside. I'll get it.
Q. Do you know what his atypical response score was?
A. I know that it was a valid measure, so if you want, I'll go out there and get the exact score.
02:09 Q. Was there any evidence in his psychological testing that

suggested he was exaggerating his symptoms?
A. In the MMPI-2RF -- and again, I'll go my report to do it -- from memory, there was a question as to whether or not there were certain responses that could have been exaggeration, but it also said if there is a history of medical issues and medical problems that could explain his responses, then they are not forms of exaggeration.
It was clear that Mr. Moore's medical records made it clear that he had substantial medical issues and that he was endorsing every item correctly based on what his experience and what his history is, so I considered it a valid profile.
Q. So you are saying the MMPI-2 was the only indication of exaggeration in his test results?
A. In my testing, yes.
Q. Did you look at any other testing?
A. Well, actually what I did is I took -- I did not give him the MMPI-2RF. It was given by Dr. Koransky who provided me the raw data, and I rescored it using the Pearson Protocol Computerized Program, so in my report I quote exactly what the computerized program said.
Q. Did you also look at Dr. Koransky's raw test data for the other tests that he administered?
A. I did not.
MR. COYLE: I have nothing further.
THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR CHAMBERS:

Q. There is one thing that I don't understand, Dr. Markel. How can Ryan have the neurocognitive disorder that you found in your testing if we see so many of his scores average or even above average?

A. Thank you for asking. So that is one of the challenges in looking at his -- the entire gamut of all the tests and all the scores that were administered by me, let alone in combination with Dr. Evans, and the way I reasoned it out and the way I explained it is that, again, this is a complex organ, and so, yes, you know, his working memory both visually and auditorily for example is excellent. It is truly excellent, as-is his remembrance of stories.

But there were certain indications along the way that stand out as, wait a minute, this is not normal, why is delayed better than immediate? Why is it that he has so much sparing? And that is what you were talking about. How is it that he has all these excellent scores and yet you are talking about four areas that are not right?

One of the magnificent things about the brain is that it is a complex organ, and one of the major things of the findings for Mr. Moore is the fact that he is still functioning extremely well. I think Dr. Lobatz said it perfectly well in what I read of his deposition, which was if any of us had the

kinds of damage that we see in his imaging study, we wouldn't function as well.

So how is he doing it? And that I think is one of the miracles of the sparing that took place. Even with all the -- the micro-hemorrhaging that we see that is diffuse in the brain, his brain is still able to do things, and the one thing his brain is still able to do is the work around, which is why it is taking him longer. That is the key issue here.

You know, to tell me that his ability on the addition test is in the above average range, fine, isn't that wonderful, but that is not processing speed. That is a specific function of a particular part of the brain that has to listen to a word problem I read to him and solve it mentally without the use of paper and pencil, and that part of his brain is still functioning.

Now, it might have even been better had this injury not happened, but he is a really strong, bright, cognitively, you know, strong person, so his brain is resilient. That doesn't mean he hasn't been damaged, and that doesn't mean that the areas that we're finding consistently in Dr. Evans' and my testing are nefarious or that they are not real. They are real. They are very real.

And they will impact and are impacting his daily functioning, and so just blow that off because he has some great scores -- you know, before we had imaging that was our

child in mild traumatic brain injuries. How do we convince this is a brain injury, this isn't something exaggerating or somebody having emotional problems.

The brilliance of what has happened with our technology is we now have imaging to say, you know what, there are some people that do not get over a mild traumatic brain injury. Many people do, three to six months they are back to normal. There is a certain sampling of people that do not. Mr. Moore is one of those people.

02:14 Q. Just one other question, a lot has been made with you and others about these MMPI and other various testing mechanisms that are sent off to scoring to other companies, and then in turn, as I understand it, you receive a score back. Is that a summary of --

02:14 A. Correct.

Q. These people that you send the scores off to have to idea who the patient is; is that right?

A. The system we use is a computerized scoring program. You input what the responses are to the items, and they -- the

02:15 computer analyzes it and spits back a report to you. The computer only knows the person's gender, their age, their level of education and whether or not they are married.

It knows nothing about their medical history. That is where you as the neuropsychologist or psychologists have to do

02:15 the interpretation and say what makes sense here, and one of

the things that came back and in Mr. Moore's interpretation was the possibility that this pattern could be exaggerating, but it also specifically points out if the person's medical history is such that these responses could be explained by a true medical condition, then this is not exaggeration. This is a valid response. That is the case with Mr. Moore.

MR CHAMBERS: Thank you, doctor.

THE COURT: Anything else?

MR. COYLE: Your Honor, since the doctor offered to get her validity scale scores on the one test, the Trauma Symptom Inventory 2, would you mind if we asked her to step outside and grab those and read them?

THE COURT: Please do that, doctor.

THE WITNESS: Got it.

MR. COYLE: May I, Your Honor?

THE COURT: You may.

RECROSS-EXAMINATION

BY MR. COYLE:

Q. What were Agent Moore's atypical response scores on the Trauma Symptom Inventory 2.

A. He has a raw score of eight.

Q. A raw score of eight?

A. A raw score of eight, and the cutoff for being invalid is 15.

Q. And what is Agent Moore's response level score on the same

test?
A. Two.
MR. COYLE: Thank you, doctor.
Nothing further.
02:17 THE COURT: Anything else?
MR CHAMBERS: No, Your Honor.
THE COURT: May this witness be excused?
MR CHAMBERS: Yes.
THE COURT: All right. Thank you.
02:17 You may stand down. You are excused as a witness.
Next witness.
MR. WOHLFEIL: Our next witness is testifying by video conference. If we can get him on the phone.
THE COURT: All right.
02:17 MR CHAMBERS: Your Honor, perhaps while we are waiting this a good time to read in the discovery responses that we intend to submit?
THE COURT: Yeah. Let me see how long it will take.
Bruno, how long will it take to get this up? How long
02:18 will it take?
A VOICE: I'll need five minutes.
THE COURT: Five minutes?
A VOICE: Yes, sir.
THE COURT: We can work while you are doing this?
02:18 A VOICE: Yes, absolutely.

THE COURT: Can you work while we're continuing?

A VOICE: Absolutely.

THE COURT: Okay. You may read the discovery responses in at this point.

02:18 MR CHAMBERS: Thank you, Your Honor.

This is from Exhibit 148 request for admission number five, question, admit that the air hose and nozzle at air compressor were discarded by Border Patrol employees after June 24th, 2013.

02:18 Would you like me to read the objections too, Your Honor?

THE COURT: No, I understand there is a stipulation, ultimately, to the answer that was given?

MR CHAMBERS: Yes.

02:18 MR. LASKE: We're not standing on the objections.

THE COURT: The objections are withdrawn. Read the answer.

MR CHAMBERS: Answer, admitted.

THE COURT: All right. I suppose that we can do this

02:19 in the form of a stipulation. The Government stipulates that sometime after June 15th, 2013 -- is that what the date was?

MR CHAMBERS: We tried to do this beforehand but --

MR. LASKE: Your Honor, the only issue when we discussed it was whether or not we thought these were

02:19 ultimately relevant, so as long as we're not waiving our

relevance objection -- that was the only issue that we thought if we stipulated that we would be waiving it.

THE COURT: I assume this is going to go to the plaintiff argument in favor of spoliation and these are predicate facts. I wasn't sure what effect it would given, I would listen to the evidence but they were entitled to put on the predicate facts, so these -- at least his first admission which I can -- I suppose I can treat as just proved, goes to that purpose, so the air hose and nozzle were lost or discarded.

MR CHAMBERS: After June 24th, 2013.

THE COURT: And the Government has admitted that?

MR CHAMBERS: Yes, they have.

THE COURT: I'm sorry. The date June 24th?

MR CHAMBERS: June 24, 2013.

THE COURT: All right. Next.

MR CHAMBERS: I am now reading from Exhibit 149, request for admission number ten, question, admit that you disposed of the chuck.

THE COURT: All right. And do they?

MR CHAMBERS: Yes, they admit.

THE COURT: The chuck being the piece that is hooked on the air hose at the front.

MR CHAMBERS: Yes. It is actually defined. I am trying to find the definition.

THE COURT: Okay. Is there a date for the disposal of that, or does it fall under the same date?

MR CHAMBERS: There is no date on that question, Your Honor.

02:20 THE COURT: Okay.

MR. LASKE: And the other question, I think the date was the date of the accident.

THE COURT: Yes.

MR. LASKE: I believe it was --

02:20 THE COURT: I am assuming the chuck was lost or disposed of sometime after June 24th, 2013.

MR. LASKE: Yes, yes.

THE COURT: Okay. Next.

MR. WOHLFEIL: Captain Moore, hold on one second.

02:21 MR CHAMBERS: We can take the last one up in a moment Your Honor. We have the witness on.

THE COURT: Okay.

MR CHAMBERS: I have one more.

THE COURT: All right. Gabby, we'll need to swear -- this is Captain Moore?

02:21 MR. WOHLFEIL: Yes, Your Honor.

THE COURT: All right. Captain Moore, can you hear me?

(Witness appearing by video conferencing.)

02:21 THE WITNESS: I sure can. Yes, sir.

THE COURT: All right. Will you raise your right hand.

THE WITNESS: Sir.

(Oath administered.)

02:21 THE WITNESS: I do.

THE COURT: Okay. Have a seat, please. If at any point during the examination you cannot hear a question, just ask that it be repeated. I'll make counsel speak into the mic.

Are you having any difficulty hearing me now?

02:21 THE WITNESS: No, sir. Crystal clear.

THE COURT: All right. Go ahead.

ADAM MOORE,

DIRECT EXAMINATION

BY MR. WOHLFEIL:

02:22 Q. Very good. Captain Moore, it looks like you are in uniform today.

A. That is correct, yes, sir.

Q. Are you a captain in US Marine Corps?

A. I am.

02:22 Q. Where are you testifying to from?

A. I am from Okinawa, Japan, right now, sir.

Q. You are Ryan's younger brother; is that right?

A. I am, yes, sir.

Q. You are actually the youngest of the siblings?

02:22 A. That is correct, yes, sir.

Q. All right. Captain Moore, I want to take you right to the night of June 24, 2013. At that time were you Ryan's emergency contact?
A. I was, yes, sir.
02:22 Q. Did you get a call regarding Ryan that night?
A. Yes, sir. I received a call around 2200 hours on the 24th, yes, sir.
Q. Is that to report that Ryan had been injured?
A. Yes, sir. The initial phone call instructed me that Ryan
02:22 had been in an accident and that he had received some lacerations and that they requested me to go to the hospital.
Q. And did you go to the hospital immediately?
A. I did. I went there immediately, arrived there probably approximately 2230, 2300 hours on the 24th.
02:23 Q. Once you arrived there, were you at the hospital every day until Ryan was discharged?
A. Yes, sir.
Q. And did your mother, Debbie, and sister, Carrie, later arrive?
02:23 MR. LASKE: Objection. These questions have been leading. A certain amount of leading is okay.
THE COURT: Actually, it is preliminary matters, so overruled at this point, but don't lead once you get to the substantive part of the testimony. Go ahead.
02:23 He asked if your mother and sister were there at some

point too.

THE WITNESS: Yes, sir. That is accurate. My mother came the following day, and my sister came a couple days after that as well.

02:23 BY MR. WOHLFEIL:

Q. Captain Moore, did you find your brother Ryan in the hospital?

A. I'm sorry. Can you repeat that question, sir?

Q. Did you find your brother Ryan in the hospital?

02:23 A. Yes. Matter of fact, once I arrived there, there was a fairly heavy police presence there. They were reluctant to let me back in the trauma room. Obviously that was an unacceptable answer for me. Eventually I did make my way through into the back into the trauma room to see him.

02:24 Q. Where was Ryan in the trauma room?

A. Ryan was laying on a gurney initially when I walked in there. He was obviously in some pretty rough shape at that point in time. There was a large laceration on the left side of his face that came from his temple, all the way down to his

02:24 lower part of the jaw.

To describe it better, it was almost as if his face was filleted open where initially he was bandaged up, but the blood was soaking through so quickly they had to continuously change out, and at that point once the bandages were off, you could

02:24 clearly see through the side of his face into his mouth. The

jaw was gone. There were no teeth on the inside of his mouth. You could see through the lower lip. There was a large laceration there you could see through-and-through. You could see muscle fibers hanging out the side of the jaw. It was pretty grotesque.

Q. Did you see injuries to his tongue?

A. I did. His tongue was shredded. A better description, I guess, it looked almost like a snake, where a snake's tongue splits out. I can't tell you how in many ways it was cut, it was definitely -- I lack better terms, but it was shredded.

Q. Was Ryan able to talk?

A. He did talk to me. He asked -- matter of fact, excuse my language, but he did ask me -- his exact words were, what the fuck are you doing here, and my response to him at that point in time, you are missing half your face, and that was the only words that were spoken the entire time.

Q. Was his jaw actually moving as he was talking?

A. His jaw was not moving. It was as if somebody were talking where there mouth did not move up and down. Words were just coming out, and it was difficult because he had a -- he had a suction that he was holding, a suction tube that he was holding initially. I had grabbed it from him and began sucking up whatever -- it was like gravel sound. I don't know if it was bone fragment or teeth or whatever. It was pretty tough.

Q. At some point did Ryan, did he need help to breathe?

A. He -- his neck was fairly -- was extremely swollen, and I know his airway was compromised, and they did do an emergency tracheotomy on him in order for him to be able to breathe.
Q. How long after you first saw Ryan did he go into surgery?
02:26 A. I'd say approximately maybe one hour or so, maybe a little more.
Q. So it was probably --
A. I know they were waiting for all the surgeons to get there.
Q. Was that early the next morning, June 25, 2013?
02:26 A. That sounds accurate, yes, sir.
Q. Do you remember what happened during that surgery?
A. Was the question what happened during the surgery?
Q. Do you remember the surgery before and after?
A. I do, yes, sir.
02:26 Q. Okay.
A. This -- I know that initially when he went in after I talked to the surgeon, I know the main goal at that point was to try to stabilize him. I know there were several issues and concerns that -- excuse me -- lost it there for a second. I
02:27 apologize. There were -- the initial concerns at that point, again, was like I said, to stabilize Ryan, to try and fix part of his jaw.
There were concerns with the nerves because the nerves, it wasn't a clean cut, it was more of a shredded, so they were
02:27 concerned about the feeling on that side of his face that he

may or may not have a permanent droop. I know they mentioned a skull fracture at that point in time, and they were concerned about potential brain swelling. There was also some issues with his saliva duct.

02:27 Again, I am not a physician. I am just going off of what I recall from them telling me. And they were concerned that because the duct was so damaged that he may or may not be able to produce any type of saliva in that side of his mouth, and they also did inform me that they were going to be putting him

02:28 into an induced coma.

Q. Did you see Ryan after he came out of surgery?

MR. LASKE: Objection, Your Honor.

THE WITNESS: I did, yes, sir.

MR. LASKE: There is no evidence in the record of

02:28 induced coma. I don't think that any doctor testified to that, and I don't think Captain Moore --

THE COURT: Sustained. There is a lack of foundation. Sustained.

BY MR. WOHLFEIL:

02:28 Q. Captain Moore, did you see Ryan when he came out of that first surgery?

A. I did. I saw him in the intensive care unit, yes, sir.

Q. What did you see?

A. At that point he was unconscious. He was in a coma. He

02:28 was wrapped up, bandaged up pretty good. There was a tube that

was coming out of the side of his face that my understanding was draining pus. There was obviously fluid that was coming out of there. Obviously motionless, not conscious. It was like -- he was in the intensive care unit, so only two
02:29 individuals were allowed in the room at the time obviously because of the intensive situation that he was in. Yes, I was there every single day throughout the time the whole time.

MR. LASKE: Your Honor, I believe the witness again mentioned the word coma. We ask that be stricken from the
02:29 record.

THE COURT: All right. That is stricken.

You can't elicit hearsay from him. He can testify to what he saw and what his own observations are, but a lot of what he knows, he knows because other people have told him. I
02:29 am assuming he was not in there during any of the surgical procedures.

MR. WOHLFEIL: Yes, sir.

THE COURT: Okay. Go ahead.

BY MR. WOHLFEIL:

02:29 Q. Captain Moore, where was the breathing tube when you saw Ryan after the surgery?

A. The breathing tube was placed in his throat where they did the tracheotomy on him.

Q. Did you have a chance to see hardware inside his mouth?

02:29 A. You could if you actually lifted up his mouth, you could

see his jaw was wired shut at that point, but like I said, the majority of the time he was bandaged up pretty significantly. Obviously there were times they had to, you know, change the dressings, you know, things like that, so you were able to see, you know, the extent of some of the damage at that point, but like I said, for the majority of the time he was bandaged up pretty heavily.

Q. Were you present when Ryan was woken up in the ICU?

A. I was, as a matter of fact, yes. When he was woken up again, it was a traumatic experience due to his reaction. I never seen anybody woken up out of a coma, so I didn't know what to expect at that point, and when he woke up, it was almost as if somebody had, you know, punched him, and it was kind of fight or flight mentality that he balled up was trying to push people away.

He had to be restrained to the bed. Two nurses came in held his arms down, and eventually they put restraints on his wrists and attached him to the bed.

MR. LASKE: Your Honor, again, we would move to strike.

THE COURT: The reference to coma is stricken.

MR. WOHLFEIL: Okay.

BY MR. WOHLFEIL:

Q. Captain Moore, you mentioned that you were in the hospital every day until Ryan was discharged?

A. That is correct.
Q. I want to talk about his time in the hospital. How was he eating, for example?
A. He had a feeding tube that was going through his nose that went into his stomach. That is how he ate for the majority of the time. Obviously, one of the stipulations prior to release was for him to be able to eat on his own, but for the majority of the time he did have a feeding tube in his nose.
Q. Was he able to talk while he was in the hospital?
A. No, he was not -- initially he was not able to talk, obviously due to the tracheotomy, so the majority of the time he would write things down on a piece of paper. That was pretty much the only type of communication he was able to do. Like his mouth was obviously wired shut and with the tracheotomy obviously he was unable to speak, but he did communicate on a pad of paper and writing with a pen.
Q. What kind of things was he writing down?
A. Well, initially the first couple days, a lot of the -- you know, he was very repetitive. He just kept asking, what happened, why am I here, what is going on, you know, things along those lines, which was frustrating due to the fact that he didn't even know why he was even there. It was obviously concerning to me at that point.
Q. At some point did he request to look at himself in a mirror?

A. Somebody brought in a hand mirror, and I took it away.
Q. Why?
A. Just because I thought he didn't -- it was the time. The healing process takes awhile, and he wasn't ready to look at
02:32 himself at that point --
Q. That was based on the comments --
A. -- in my opinion.
Q. That was based on the comments that he was writing down?
A. Absolutely, just because, like I said, my opinion his
02:33 mental state, where he was at that point. He wasn't ready for that.
Q. How long was it before he could walk again?
A. Several days, I can't remember off the top of my head. Again, that was one of the stipulations prior to his discharge
02:33 was that he did have to walk. When he did walk, we would help him, and he had to take his tower with him. I call it a tower. It was IVs and medicines and whole bunch -- monitors, and there is a whole bunch of gadgets on there that he had to take with him everywhere he went.
02:33 Q. Did you see that he was on any medications?
A. Well, he was on several medications. He was on morphine, Dilaudid, fentanyl, antibiotics. There is medicine for -- anti-inflammatory medicine. There was a whole -- I call it cocktail of medicines. There were just so many that I quite
02:34 frankly I can't tell you off the top of my head what exactly

all of them were.
Q. He was discharged on or about July 10, 2013; is that right?
A. That sounds about right, yes, sir.
Q. How did he get home?
02:34 A. I took him home. We used my truck, and I had to help him obviously get into my truck, and I had to drive him back to his house in Ramona.
Q. After you dropped him off at the house, what did you do?
A. I went to the grocery store and the pharmacy to get his --
02:34 to get his medications just because obviously he was unable to, you know, go out, you know, do that on his own, plus he was in a pretty fragile state at that time.
Q. When you went to get his medication, where did you get his medication? Was that from the pharmacy?
02:35 A. Correct, the pharmacy in Ramona.
Q. Was that easy to get the medication?
A. Yes and no. I know there was a lot of questions asking just because of the amount of medication that he was -- that he was prescribed, and allegedly it was a fairly high dose of
02:35 narcotics, if you will. I had to provide my driver's license, identification for the DEA records and whatnot, but I knew that they were reluctant to give me the full amounts of what was prescribed just because it was such a high dose of narcotic medication.
02:35 Q. After you got the groceries and the medication, did you

return back to Ryan's house?
A. I did, yes, sir.
Q. And was there -- did something happen between you and Ryan at that point?
02:35 A. Yeah, matter of fact, at that point I saw him -- excuse me -- he was crying in his bed. He was -- he was in a fetal position, and he was crying uncontrollably, and it was tough for me because I never seen him cry like that before in my entire life.
02:36 Q. How long did that go on?
A. 10 or 15 minutes, quite a lot.
Q. Did you talk about what was going on with Ryan?
A. No. There was no talking. I just told him I loved him and held him.
02:36 Q. Okay. After that point Ryan had additional surgeries; is that correct?
A. That is correct, yes, sir.
Q. Do you play a role in making sure that he got to and from surgeries?
02:36 A. Yes, sir. As long as I was available I took him to every single one.
Q. Okay. At some point did you have conversations with Ryan after the surgeries?
A. I mean, yeah, I obviously discussed them with him prior to
02:37 and afterwards. They were difficult because every single one

was almost like you take two steps forward with the recovery process, and then he would have another surgery, and he it was like he took two steps back. The tremendous pain and the position that he was in prior to where it was almost like he was recovering, maybe feeling a little better physically, then he would have another surgery and he would go right back to square one.

Being on narcotics, which obviously nobody likes to be on narcotics, makes you feel terrible, and he was just -- it was frustrating having to see -- kind of replay the same situation over and over again.

Q. Do you remember a surgery in August of 2013, and specifically do you remember -- did Ryan convey you his understanding of what that surgery would be?

A. Was that the surgery at Sharp Memorial? Is that off the 163?

Q. Yes.

A. Is that the one you are referring to? Yes. I took him to that surgery, and again, that was another one of those where what he had told me what he was anticipating happening and what actually happened were two totally different things. As a matter of fact when I dropped him off I worked at recruit depot in San Diego so I was fairly close, and so the intent was drop him off for the day surgery and to pick him up at the end of the day, and it didn't transpire that way.

As a matter of fact, he was there for, I believe -- I may be incorrect by speaking this -- I believe he was there for four days. I think they rebroke his jaw. They removed the bars from his --

02:38 MR. LASKE: Objection.

THE WITNESS: -- or removed the arch bars from his jaw.

MR. LASKE: The foundation hasn't been laid.

THE COURT: Hold on, captain.

02:39 MR. LASKE: The witness started saying, I think, so at least --

THE COURT: There is a lack of foundation anyway. He is not the one performing the tests. Sustained on that basis.

BY MR. WOHLFEIL:

02:39 Q. Captain Moore, did you have an opportunity to see Ryan after he was discharged after the August 2013 surgery?

A. Yes, absolutely. His face was huge. It was swollen. He had raccoon eyes, black and blue. You could tell it was very significant surgery. It was a major surgery, which was

02:39 obviously vastly different than what he anticipated would happen to him when I dropped him off.

Like I said the intent was drop him off, day surgery, pick him up couple hours later whenever he was ready to go, but like I said it lasted for four days that he was in the hospital. It

02:39 was an extended period of time that he was not anticipating

doing. And what they actually did to him was not what he had informed me prior to going to the surgery of what he anticipated having done at that point in time.

Q. At that point, without getting into the substance of the conversations, did you begin a sort of ongoing conversation with Ryan's doctors?

A. I did. At that point it was concerning to me just because this was not the first time where he had gone in for an operation of what he thought was going to happen and what the doctors actually did, they were two totally different things, so at that point is when I became more engaged with conversations with his physicians as to the extent and what they were actually going to be doing because one of the common themes that was transpiring from here on out was that what Ryan thought was happening or going to happen was different than what the doctors were telling me.

So again, that was concerning to me because I wanted to make sure that I was tracking so I was able to be there for him and to provide the assistance that he needed in whatever capacity I could do that for.

Q. Captain Moore, I want to move to a surgery in September of 2013. Just yes or no, do you remember that surgery?

A. Yes, I do. I believe that was one when they pulled -- they may have pulled teeth out of his mouth, and I think --

MR. LASKE: Same objection.

THE WITNESS: Yes, I do.
BY MR. WOHLFEIL:
Q. Did you have a chance to see your brother after that surgery?
02:41 A. I did, yes, sir.
Q. Did you see that they pulled the tooth?
A. I did. And at that point in time, Ryan believed that he was going to get posts inserted into his mouth, but there were no posts after that surgery at all.
02:41 Q. Let's move to --
A. Which is, again, concerning to me because that is what I had anticipated to see and expect afterwards, but it was not what happened.
Q. Let's move to March 2014, did Ryan have a surgery that
02:41 month?
A. Yes, sir.
Q. And how did he get to and from the surgery?
A. I drove him to the surgery, as well as I drove him home as well.
02:42 Q. Following the surgery, did you have a chance to see differences inside of his mouth?
A. I did. That was, in fact, when they actually did put the metal posts inside his mouth.
Q. Let's move to June of 2015. Do you remember a surgery in
02:42 June of 2015?

A. Yes, sir, I do. As a matter of fact, that was the last one that I had taken Ryan to prior to moving to Japan.
Q. What was your understanding of Ryan's expectations for that surgery before the surgery?
02:42 A. At that point in time --
MR. LASKE: Your Honor, objection --
THE WITNESS: -- I believe that the doctor's name was Dr. Kohani.
THE COURT: The objection is sustained. Next
02:42 question.
BY MR. WOHLFEIL:
Q. Captain Moore, have you noticed any changes or did you notice any changes in Ryan's weight after the incident in June of 2013?
02:42 A. Absolutely. I mean, Ryan's weight had fluctuated significantly throughout, you know, his surgeries, or -- after his accident. As a matter of fact, he lost, I don't know the exact amount of weight, I would say upwards of well over 25 pounds, even to the point he had to get new clothes.
02:43 In fact, I gave him some of my clothes to wear just because of the amount of weight that he lost, and then conversely there were times he would gain the weight back because he wasn't as active physically as he had been prior to the surgeries.
Q. Let's talk about Ryan's physical activities. What kinds of
02:43 things did he enjoy before the accident?

A. Ryan was an active individual. He played softball. Matter of fact, he was on traveling softball teams, went to traveling softball tournaments. We would play golf together, go on hikes. Ryan was fit. He was an in-shape guy. He was an athlete. It didn't matter if it was basketball, if it was football, if it was soccer, if it was baseball, he was an athlete.

He played sports. It didn't matter what sport we were playing. He was actually good at it, which was good because it gave us a little brotherly competition.

Q. Since the incident, what is your impression of his activity level?

A. Well, since his accident, his activity level has been pretty much nonexistent, besides moving and being around his house. We haven't been out. We haven't -- I know he hasn't played softball since then. Softball was one of the big things he did. He doesn't go out for hikes. He doesn't exercise. He doesn't play sports anymore. So it is significantly -- it is very -- it is vastly different than what it was prior to the accident.

Q. Captain Moore, do you remember an incident in the summer or fall of 2014 with Ryan at Ryan's house?

A. I'm sorry. Can you repeat the question, please?

Q. Yes. Captain Moore, do you remember an incident with Ryan at Ryan's house in the summer or fall of 2014?

A. I do. At that point in time I know Ryan had built a fire pit around -- at his house, and we were doing -- assisting him in helping him finish - do some finishing touches on it, and he fell in the middle of the fireplace -- I'm sorry -- the fire
02:45 pit. He fell right in the middle of the fire pit and had jumped up.

I don't know, he jumped up but obviously collected himself, got up, and kind of moved on nonchalantly as if nothing happened, which was concerning to me. He completely -- it was
02:45 almost as if he lost his balance. We call it like he got hit by a sniper in the Marine Corps, but out of nowhere he fell in the middle of the fire pit, and again, like I said, nothing like that had ever happened before.

Q. Let's talk about Ryan's social activities. You touched on
02:46 it a little bit, but before the incident did you have an opportunity for Ryan to socialize out at, for example, bars, restaurants?

A. Yes, absolutely. As a matter of fact, we would get together several times a month where we would try to visit
02:46 local brewery, meet up for lunch, go to baseball games. He would come over to my house. I would go over to his house. You know, we would -- matter of fact, we would go to football games, went to college bowl games. We probably would get together at least two or three times a month.

02:46 Q. And how often have you done that since the incident?

A. Well, since his accident there is only one time, and it actually turned into a disaster trying to get him to go out and do something like that. We -- it took awhile of some kind of convincing to get him to leave the house just because he was -- he was embarrassed about the way he looked.

And so convincing him to leave his house, I was trying to help him out to try to get him back to some normal lifestyle to get him out to be a part of society, meet people and talk to people, and just get out where we convinced him to finally go up to LA for a weekend to go see the Dodgers play the Milwaukee Brewers.

And actually kind of backfired on me a little bit because we went there, got a hotel, checked into the hotel. Before the game and went to a bar, and when we went to the bar, we ordered first round of beers, order a round of beers. Second round, Ryan says, hey, I got it, I'll take the second round. Ryan goes up to order the second round of beers and comes back to the table and no beer, says, hey, we have to go and obviously I looked at him quizzically, why do we have to leave?

At that point in time he told me that the bartender cut him off because he was slurring his speech and that he needed to go. So at that point in time I decided I would have some words with the bartender where I told him, look, we just got here. We just drove up from San Diego. This is the second beer we had. I can assure that you nobody is intoxicated. The reason

you think my brother is slurring his speech is because he has no teeth in his mouth. Look at his face. You can see that he had a very serious injury.

And that is where the bartender proceeded to say that, hey, I am the one with the liquor license, I am the one that has to worry about these things, and obviously we left. At that point in time, like I said, it backfired on me. At that point what was to be, you know, a coming out if you will to get Ryan out into society kind of backfired just because now his fears were being realized, were becoming reality of how he was going to be treated and how people out in, you know, normal public would view him and judge him to be quite frank.

Q. Captain Moore, let's talk about Ryan -- the changes you noticed in Ryan emotionally. Can you describe some things you know about him from before the incident?

A. Sure. So, you know, before the incident, Ryan's nickname was chuckles. He was a guy that always had this big little smirk smile, had this little giggle laugh that was very consistent, like I say going back for 30 some odd years. Like I said, that was his nickname, chuckles. Outgoing individual that likes to go out, socialize, try to meet women, if you will.

Since that accident it is not, not, not the same at all. He is reluctant to go out. He is reluctant to try to engage in any type of social conversations with people. He doesn't want

to go home to see his friends. He is embarrassed about the way he looks. He is embarrassed about what has happened to him.

Emotionally he has changed where like -- you know, prior to the accident I saw him -- matter of fact I saw him tear up one time. That was at my grandfather's funeral. It was more -- it wasn't like a -- it wasn't like a crying, but you could see he was shedding tears, if you will.

Since the accident, you know, I've seen him, you know, not only become emotional but, you know, bawl, on a couple occasions, that it never happened before in, you know, it obviously concerned me because the guy I never seen cry before in my life I seen him now several times completely bawl, and it is -- he is significantly changed he is definitely not the same person as he was before.

Q. Captain Moore, the couple times that you've seen your brother bawl, is there anything that triggered it?

A. You know, I don't know --

MR. LASKE: Objection, calls for speculation.

THE WITNESS: -- there were several instances.

THE COURT: Hold on, captain.

MR. LASKE: Objection, calls for speculation, and there is no foundation for it.

THE COURT: The question is, has he seen what has caused him to cry?

MR. WOHLFEIL: Yes, from what he has observed, has

anything prompted --

THE COURT: Based on your observations, have you seen what prompts him to cry is the question. The objection is overruled. You may answer that.

02:51 BY MR. WOHLFEIL:

Q. Captain Moore, did you hear the question?

A. Can you repeat it, sir.

Q. Sure. You mentioned a couple times where you've seen your brother Ryan crying, and my question is, could you tell what

02:51 was prompting him to do so, if anything?

A. Yeah. There were several instances. One in particular my sister had come out to visit Ryan after the accident. It was probably about a year or so afterwards, and she was trying to convince him to come home. Some friends of his were going to

02:51 do a fundraiser to try to help Ryan out with some of his medical bills.

At that point in time my sister Carrie was trying to convince him saying, hey, you need to come home, you need to see your friends, they care about you, they love you. And he

02:52 just completely lost it, said you don't understand what I am going through, nobody understands, I don't want to have to relive this, and he completely blew up, and again uncontrollably started crying, to the point where, again, it wasn't even a cry. It was a bawl, and it lasted for an

02:52 extended period of time, and, again, I just held him, told him

I love him, and it was all that I could do at that point.
Q. How long did that emotion in Ryan seem to last?
A. That particular crying is that what you are specifically talking about?
02:52 Q. Yes.
A. 15 to 20 minutes at least.
Q. After that incident involving your brother Ryan and your sister Carrie -- well, let me ask this question first, where was Carrie staying at that point?
02:52 A. Well, initially she was staying with Ryan, but after that incident, Carrie then came and stayed with me at my house in Oceanside.
Q. Let's talk about Ryan's -- the differences you have observed if Ryan's memory before the incident compared to after
02:53 the incident. Describe Ryan's memory from before the incident.
A. Well, I mean, before the incident Ryan was -- matter of fact, he was one of those guys that would, you know, kind of throw things in your face about things you had said or done in the past. He seemed to have a, you know, very strong, robust
02:53 memory about absolutely everything, whether it was sports, things that had occurred -- you know, arguments, discussions you had been, like I said, he remembering.
Since the incident he has a tendency -- he writes things down now. Something as small as going to the grocery store
02:53 just to pick up two or three items, he'll actually write it

down. He has a pen and paper or a pad and paper in his house that he writes things down to remind him of things he needs to do, and it is -- it is vastly different than he was, you know, prior to his accident.

02:54 Q. Were you and Ryan together for a trip in early June of 2013?

A. Yeah. Matter of fact we took a -- we took a tour of northern California. It was kind of like a brewery tour where we drove north through San Francisco. The destination was kind

02:54 of hit the Redwoods and all the breweries that are north of San Francisco on that route. We went for approximately ten days to two weeks, yes, sir.

Q. Since the incident on June 24, 2013, have you had a chance to discuss that brew tour with Ryan?

02:54 A. We have. I know he -- he knows we went on it -- he knows we went on a vacation, but the majority of what we did and what we saw he doesn't remember. Like he doesn't remember, you know, certain instances where part of the Redwoods we went through --

02:55 MR. LASKE: Objection.

THE WITNESS: -- there was a tree that you can drive through --

THE COURT: Hold on, hold on just a second. The objection is sustained. Lack of foundation.

02:55 BY MR. WOHLFEIL:

Q. Captain Moore, let's move on. We've already heard a little bit from Ryan and your mother Debbie about your and Ryan's upbringing in Wisconsin, but can you share a little bit about that, how that impacted you and Ryan and your desire to work?

02:55 A. Sure, absolutely. So my parents got divorced when young, for a young age for me. I believe I was 6 or 7, and, you know, work ethic is something that is engrained in us.

Matter of fact, we grew up in the suburbs of Milwaukee, and right after my parents got divorced, my mother was working

02:55 three jobs, so that was something engrained in us, hey, you know, in order to survive, you work. So ever since we were 12 years old we had a job. We started off with paper routes. We moved up from there, whether it was working at the grocery store, gas stations, working at the summerfest grounds, we

02:56 always had a job.

Working is something that is normal to us. You know, it is something that we believe that is what we need to do to be part of society. It is not indicative of normalcy but more along the lines that is what we were raised to do, and, you know, it

02:56 is something that we've always -- always done, and it is something that we always will do. It is something that kind of brings closure to, you know, some of the distracting -- kind of helps you with the distractions that are going on around you because it gives you something to concentrate on and get your

02:56 mind off the reality of the situations.

MR. WOHLFEIL: Captain Moore, I don't have any other questions. Thank you very much.

THE COURT: All right. Cross-examine.

MR. LASKE: Thank you, Your Honor.

02:57 CROSS-EXAMINATION

BY MR. LASKE:

Q. I guess it is good morning for you, sir, Captain Moore.

A. Yes. Good morning, sir.

Q. And you've been stationed at the Marine Corps base in Tokyo since the summer of 2015; correct?

A. That is incorrect. I am actually in Okinawa, Japan. Tokyo is on the mainland Japan. Yes, since June 24th, 2015, that is accurate, sir.

Q. So you haven't had a chance to see your brother that often in the last 20 months?

A. That is actually inaccurate. I speak with him on face time probably once a week, at minimum. I have also been home several times between then. So I would say that is inaccurate.

Q. But you don't live with your brother now?

A. That is correct. I haven't lived with my brother since I was 18 years old.

Q. And you don't work with your brother now?

A. No. I do not work with my brother.

Q. And are you aware that he drives as part of his task force assignment?

A. That he drives?
Q. Yes. Like a government vehicle?
A. A vehicle?
Q. Yes.
02:58 A. I would assume so, sure.
Q. I was just asking one way or another if you knew that. Sounds like you don't.
A. Yeah, yes, sir. We haven't spoken about that, but I assume that he's drives for his job, yes.
02:58 Q. Are you aware that he carries a gun as part of his task force assignment?
A. I am aware of that, yes, sir.
MR. LASKE: Nothing further, Your Honor.
THE COURT: Anything else?
02:58 MR. WOHLFEIL: No, Your Honor.
THE COURT: Okay. Captain Moore, thank you. I appreciate your flexibility and your appearance.
May this gentleman be excused as a witness?
MR. WOHLFEIL: Yes, Your Honor.
02:58 THE COURT: All right. You can sign off now, captain. Thank you.
THE WITNESS: Thank you, sir.
THE COURT: Next witness.
MR. WOHLFEIL: Call Doreen Casuto.
02:58 THE COURT: You get a word in edgewise on those face

time talks?

MR. MOORE: Rarely.

THE COURT: He's an enthusiastic younger brother.

MR. MOORE: He is.

02:59 THE COURT: You guys kind of look alike.

MR. MOORE: Yeah.

THE COURT: I see the family resemblance. You have two brothers?

MR. MOORE: No, just him. I have an older sister.

02:59 THE COURT: A sister too, okay.

THE CLERK: Can you please raise your right hand.

(Oath administered.)

THE WITNESS: I do.

THE CLERK: Thank you. Please take a seat. Speak

03:00 into the microphone at all times. Can you please state and spell your first and last name for the record.

THE WITNESS: Doreen Casuto, D-O-R-E-E-N, C-A-S-U-T-O.

DOREEN CASUTO,

DIRECT EXAMINATION

03:00 BY MR. WOHLFEIL:

Q. Good afternoon, Ms. Casuto.

A. Good afternoon.

Q. Let's jump right into your assignment in this case. It was to generate a life-care plan for Ryan Moore; is that correct?

03:00 A. That's correct.

Q. I understand that you are a certified life-care planner?
A. Yes.
Q. Is that true since about 2000?
A. Correct.
03:00 Q. Can you see Exhibit 66 on the screen if front of you?
A. Yes.
Q. Is 66 a copy of your report?
A. Yes, it is.
Q. Okay. We're at page one. I want to go through it briefly.
03:01 Can you describe what we're looking at one page one?
A. It has Mr. Moore's name, his address, birth date, the date of his injury, and then the diagnoses which were basically initially gleaned from the medical records and then from all of the physicians that I talked to.
03:01 Q. And using your background, training, and experience, did you compile -- and your communications with Ryan's doctors, did you compile a life-care plan for Mr. Moore?
A. Yes, including the experts associated and doing the research.
03:01 Q. Page two, please. So we're at page two of your report. I see a recommendation in the -- on the top row there, under care need for rehabilitation, neurologist and physiatrist. Looks like that came from Dr. Lobatz?
A. Correct.
03:02 Q. In the description rationale column, I see what looks to be

pricing?
A. Yes, and also frequency.
Q. Very good. What is the -- what is the opinion in that row?
A. So Dr. Lobatz felt twice a year for two years and
03:02 thereafter yearly with an initial eval between 250 and 475 and
a follow-up 150 to 200.
Q. Very good. I want to drop down to the row for oral and
maxillofacial surgeon. What is the recommendation and opinion
there?
03:02 A. So that was Dr. Machado, and his recommendation was one
time a year for five years, initial eval at 200 to 350 and
follow-up at 110 to 250 a time.
Q. Very good. I want to jump down to the row entitled
dentist, and I want to combine it with the bottom row entitled
03:02 additional treatment. Both of those appear to be from Dr.
Kohani; is that correct?
A. That's correct.
Q. What is the recommendation and opinion there?
A. So initially it was one time a year more than typical for
03:03 maintaining surrounding teeth and gums, and then Dr. Kohani in
his deposition changed it to three to four times a year rather
than twice a year. Dental exams, 63 to 114 a time. Cleaning,
105 to 114. And then he said there should be periodontal
cleaning with removal and replacement of his prosthetic bridge
03:03 at 800 to 1200 a time for every 18 to 24 months. And then the

crown for tooth number 12 is crossed out because Dr. Kohani said that was no longer needed.

Q. And going down to the additional treatment, looks like there is a reference to a veneer?

03:03 A. Correct. So Dr. Kohani had placed a veneer on the number 12 tooth. I wrote polish meaning polished veneer, not that you polish the veneer as a treatment, so Dr. Kohani's office gave me the price of $2,500 a time, and he recommended it be replaced every 7 to 10 years.

03:04 Q. Very good. Page three. I want to do the top three rows. They all appear to relate to Dr. Kohani. Can you explain those three opinions?

A. So Dr. Kohani said he wanted future replacement of the implants. It was 50 percent of the initial implants would need

03:04 to be replaced in 10 to 15 years. 20 years was crossed out which is what Dr. Kohani initially told me. He originally said there would be 13 to 14 implants. There were only 12, so those were only the initial ones and he said only 50 percent, so that would mean six teeth implants were needed. To remove the

03:04 implants it was 550 a tooth.

The prep for the implants, which was six not seven needed, included a bone replacement graft at $1,500 each tooth, a biomat-aid osseous tissue at 430 each tooth, and guided tissue regeneration at 1100 each tooth. The implants itself cost

03:05 $5,865 per tooth, and the pain medication after surgery was 50

to $100. Brandy, his billing person, gave me all of those prices.

The next one is future replacement of the abutment or crowns on the replacement of the implants, 50 percent, again in 10 to 15 years. 12 meaning six abutments are needed. The abutment supports are $3,900 each, six needed. Cross out of the porcelain ceramic. Then the custom abutment is $1,200 each for six, and then he would need to replace the whole prosthetic bridge at $3,300 the upper and the lower one was 4700 and $400.

03:06 Then Dr. Kohani also stated that the replacement of the prosthetic bridge would need to be done two times over his life both the upper and the lower, the upper being 33 hundred and 300 -- 33,300 and the lower one being 47,400 both of those two times, and that was again from Brandy.

03:06 Q. Very good. Ms. Casuto, I think you said 4700 400 for the previous opinion. It is $47,000?

A. 47,400 sorry.

Q. That's okay. Let's drop to recommendation from psychiatrist. That came from multiple doctors?

03:06 A. It came from Dr. Koransky, Trenton Moyer his treater, and Dr. Markel, and that was every -- to evaluate and provide treatment. Do you need me to read that part too?

Q. Yes, please.

A. Provide treatment for symptoms of depression, post-traumatic stress disorder, PTSD, and adjustments. And

03:06

initially it was one every one to three months, from his treater, and then it was an evaluation and monthly visits for six months, and then every three months for five years now and one additional series over life. Prices for the initial eval were 350 to 500. Medication management was 150 to 175, and his treater, Dr. Moyer agreed with that.

Q. Very good. Let's drop down to the recommendation for a neuroophthalmologist?

A. That was Dr. Lobatz and Dr. Markel, evaluation and follow-up visit for light sensitivity and visual issues. Evaluation at 635, and follow-up 210.

Q. I want to take the bottom two rows, the recommendations for lab work and diagnostics together.

A. Okay. First one is the lab work, and it was Trenton Moyer and also Dr. Lobatz when I looked through my records. It was one time a year more than typical if on medication, and the price for the CBC is 49 to 85, and the CMP is 69 to 130, and those both include the cost for the blood draw which needs to be included in there, so that is what is included if there.

The diagnostics by Dr. Kohani and Dr. Lobatz are maxillofacial CT, $732 to 1354 every one to two years. Then there is a possible TMJ MRI. That is 1425 to 2366, and it is only one time. MRI of the brain at 2380 to 3626 per time, two to four times over life.

Q. Let's go to page four, and start with the top

recommendation of medications, again, several doctors there.
A. Yes, I have Dr. Koransky, Trenton Moyer, Dr. Lobatz, and Dr. Markel. And the first one is Zoloft, and it is 100 milligrams, and it $10 to $15. Actually, Mr. Moore is
03:09 taking that twice a day not just once. Lorazepam or Ativan, one milligram 680 to 840 -- 840 -- actually I misspoke. Zoloft is one time a day. It is Ativan that he is doing twice a day. Gabapentin, 300 to 600 milligrams, three times a day, and I had written down 100 to 195. Actually, the actual price you can
03:09 either get it with a coupon or without a coupon. With the coupon it matches what the defense came up, which is the 42.28, but if you don't have a coupon which you can't always get, it is 70 to 160, not the 100 to 195.

The other thing is we have a possible additional medication
03:10 for depression or anxiety, and that is 100 to 200 right now. He's on Vistaril, 25 milligrams for anxiety. That is 9.98 to $15 a month. He is also on Ibuprofen, 800 milligrams, zero to three times a day, and it was 8 to $10 a month.
Q. I see a recommendation for a neuropsychological evaluation
03:10 from Dr. Markel.
A. That's correct. It had possible-probable before when I produced the federal report which was before I talked to Dr. Markel and got Dr. Lobatz in. It was an evaluation of every five years not one time. Neuropsych eval is 2500 to 3500 per
03:10 time.

Q. Let's take the next two rows together, the recommendation for psychologist and for cognitive remediation.

A. The psychologist was recommended by Dr. Koransky, Dr. Markel, and his treater Mark Marvin -- Dr. Mark Marvin. It was 03:11 treatment for cognitive issues, post-traumatic stress disorder, depressive disorder, anxiety and relationship dysfunction, now 50 sessions for the first year, 25 sessions for the second, and repeat that series one to two times over life. The initial eval is 180 to 450, and treatment is 150 to 280 per session. 03:11 And Dr. Marvin did agree as the treater for episodics.

Cognitive remediation was Dr. Markel and Dr. Lobatz, cognitive remediation with speech language therapist, two to three times a week for three months, initial evaluations 247 to 527, treatment 129 to 199. Dr. Kohani agreed with it, but he 03:11 didn't give me his initials.

Q. Very good. Let's move to therapeutic self-management pain program.

A. So this is a shortened pain program as compared to the 9 to 12 week program, so it is a Sharp pain management program that 03:12 meets weekly in group sessions for six weeks, two hours each time, and it includes cognitive behavioral therapy. It is a relaxation and biofeedback, as well as physical therapy, and qigong, which is a kind of meditation exercise, two hours a week for six weeks. Initial evaluation is 320 which is a 03:12 two-hour evaluation. The weekly group sessions are 162 a

session. The case conference with the treatment team is 197 which is done one time. After the six-week program there is a re-evaluation at 162 to determine if any additional program is warranted.

03:12 Q. Very good. I see your category of miscellaneous equipment?

A. That was Dr. Kohani for most of it. Custom mouthguard he felt was needed, 300 to 500 a time, every one to two years. Hot packs for his pain, 13 to $20 a time, two times per year. Electric razor, 60 to 80 percent -- $80 per time, two times

03:13 with replacement heads, 21 to 27, three per year, and that is based on him having the indentations in his face now.

Water pick Dr. Kohani felt was really important, 49.99 to 69.99, every three to five years, and the tip that you use is 14.99, and you replace that four times a year. The Rotadent

03:13 toothbrush is 129.99 per time. You replace it every three years, and you replace the brush heads at 12.77 a time, every other month.

Q. Finally, I see the recommendation for housekeeper.

A. Right. So it was a housekeeper handyman. Now it is only

03:13 housekeeper based on my discussion with Mr. Moore. Housekeeper, one to two times a month, not two to four times a punt for four hours per time at 10 to $15 an hour.

Q. Okay. Thank you, Ms. Casuto, just a couple more questions. Are all of your opinions regarding the pricing that we've just

03:14 discussed reasonable for the community?

A. Yes -- yes, it is.
Q. And after you finished your report, which is Exhibit 66, did you send a copy of your report to economist Heather Xitco?
A. Yes, I did.
03:14 MR. WOHLFEIL: Those are all my questions.
THE COURT: Who made the housekeeper recommendation?
THE WITNESS: I did.
THE COURT: Cross-examination.
MR. LASKE: Yes, Your Honor.
03:14 CROSS-EXAMINATION
BY MR. LASKE:
Q. Good afternoon, Ms. Casuto -- or Nurse Casuto. Did you happen to review plaintiff's deposition before creating your May 6th, 2016, report?
03:14 A. Yes, I remember I did.
Q. The opinions about care listed in the life-care plan, that is from plaintiff's experts; correct?
A. No. It actually had Dr. Machado, Dr. Kohani, Dr. Marvin and Moyer who are all treaters. They may also be considered
03:15 experts, but they are treaters.
Q. So, for example, the dental care is all from doctors, treating dentists or an expert dentists?
A. If you consider them experts, but they are people who have actually been treating him, correct.
03:15 Q. But they are medical professionals in the field?

A. Correct.
Q. Same thing with imaging and examinations; right?
A. Examinations?
Q. Anything about imaging?
03:15 A. Yes, same thing about imaging. I didn't know what you were talking about examination.
Q. I think there may be some future examinations in here.
A. You mean in terms of doctors or --
Q. Like psychiatric evaluations, those are the psychiatrists
03:15 not you?
A. Correct. Those all have initials, so you'll be able to identify who provided the recommendation.
Q. And where the only exception is -- we'll show you Exhibit 66, page four, is the housekeeper and at one time I
03:16 guess it was the handyman?
A. Correct.
Q. So you mentioned that the plaintiff told you to remove the cost. Is that what happened?
A. No. What I said when I talked to Mr. Moore in going over
03:16 stuff, he said that he was doing more handyman, but the problem is he found it very difficult to keep up with the housekeeping based on him working five 10-hour days or sometimes a little longer, so he doesn't really have the endurance when he comes back home, so where he used to be able to keep up with
03:16 housework, he has not been able to do that since his injury.

And so we did it one to two times a month so it would be a little bit extra help, but that he would still pick up for himself and stuff like that, but the extra stuff he would have help with.

03:16 Q. So the housekeeper is your opinion then?

A. That is correct.

Q. Okay. For the other opinions, the ones that are not the housekeeper, if for some reason the other doctors you relied on happen to be incorrect, then would that affect the recommended

03:17 care on your life-care plan?

A. If they decided to -- if something came up during trial and they changed their testimony, I talked to 26 -- talked to the doctors 26 times, plus read all of their depositions, and so this is pretty consistent with what they told me and at their

03:17 depositions so if they changed it, yes.

Q. I guess -- maybe we're not on the same page. What I was trying to ask, for example, in this case there are opposing experts, and if the judge finds in favor of one expert than the other, would that affect some of your recommendations? In

03:17 other words, you are relying on these experts, so if it is found that whatever they said doesn't stand up, would that affect the overall costs?

MR. WOHLFEIL: Objection, vague.

THE COURT: Yeah, I think so. Your opinions are your

03:18 opinions regardless of whether I agree with them.

THE WITNESS: Correct, and the doctor's opinions whoever gave me the opinion.
BY MR. LASKE:
Q. But the recommended care is based on the doctors?
03:18 A. Yes, plus what I see in the community, you know. I am a rehab nurse. I do this all the time, and I am a case manager, so if somebody would have come up with an opinion that sounded really strange, I probably would have talked to whoever it was.
Q. And you are aware that at the time of the initial report
03:18 Ryan Moore was on a cross border task force?
A. At the -- do that one again. I just missed that part.
Q. The initial report was produced around December 2015, and as I think it was early, early or late summer of 2015 he was on a cross border task force. Were you aware of that?
03:18 A. I thought he was on a drug task force. That is what I had because when I talked to him just recently I said to him weren't you on a drug task force in El Cajon, and he said yes, and I said, so what are you doing now, so I don't -- they may be synonymous. I don't know. That is what he told me. I
03:19 don't know if it is the same.
Q. And are you aware that today he is on an FBI task force?
A. Yes, I am. He told me he was, right around the time of my depo he must have done that.
Q. But you still believe he needs about $19,000 for a
03:19 housekeeper for the rest of his life?

A. Actually, you'll have to talk to Heather. I can only talk to you about the hourly rate.
Q. Heather?
A. Xitco who is the economist. I didn't total it up.
03:19 Q. The opinions about many of the costs, they are your own; correct?
A. No. As I said before, it depends what costs you are talking about, so Dr. Kohani's, all of his costs came from his office, so he provided everything --
03:20 Q. So --
A. -- I used.
Q. For example, if Dr. Kohani's office didn't follow a reasonable and customary cost for the relevant community, would that affect any of your report?
03:20 A. Yes, so I, have as I testified in my deposition, I have other patients that have implants over a broader spectrum and do have the abutments and the prosthetics, so I checked to see if that looked what was in line. I was actually mentioned in my depo that I was treating with another patient on a prior
03:20 doctor that Mr. Moore had seen before.
Q. And we're talking about Dr. Burger; correct?
A. Correct.
Q. Is it your understanding that Dr. Burger and Dr. Kohani do the same exact work or would they work hand in hand?
03:20 A. Well, Dr. Burger does more of the implants parts and Dr.

Kohani does that, but Dr. Burger actually overlaps with Dr. Machado.

THE COURT: Dr. Burger is a medical doctor, isn't he?

THE WITNESS: Maxillofacial.

03:21 THE COURT: Dr. Kohani is not. He is a --

THE WITNESS: Dentist.

THE COURT: Right.

MR. LASKE: Nothing further.

THE COURT: Anything else?

03:21 MR. WOHLFEIL: No, Your Honor.

THE COURT: All right. May she be excused as a witness?

MR. WOHLFEIL: Yes, Your Honor.

THE COURT: All right. You are excused as a witness.

03:21 Do you have another witness ready?

MR CHAMBERS: We have Mr. Moore to finish up, and then I think we'll rest, so whether we want to break now and finish him off.

THE COURT: Yeah, okay. I have -- we're trying to

03:21 work out some logistics on another civil case in a week and a half. They'll call at 3:35, Michael?

A VOICE: Yes, Judge.

THE COURT: We'll be in recess until 3:40, 3:40 and then we'll finish with Mr. Moore -- Agent Moore's testimony.

03:21 MR CHAMBERS: Thank you, Your Honor.

THE COURT: Is the defense ready to go today?
MR. LASKE: Yes.
THE COURT: You have witnesses?
MR. LASKE: There will be a witness, and obviously --
03:22 THE COURT: I hope you are going to get us to 5:00.
MR. LASKE: Yeah, we'll get to 5:00.
THE COURT: Tomorrow, as a matter of scheduling, I am going to ask that you come in a little bit later. I got to get this big club off my arm, and they are going to do it at 9:10 over at Balboa. Just to be safe, I would say 10:30 tomorrow rather than 9:00. Is that -- I hope that doesn't inconvenience you as far as witnesses.
MR. LASKE: Your Honor, based on kind of our scorecard of timing, I think that is perfectly fine. Once we had -- I know we have a long list, but a lot of the people in the front will go fast.
THE COURT: Okay. What do you anticipate? Assuming plaintiff rests today, how long do you think your case-in-chief will take?
03:22 MR. LASKE: I think because of scheduling we have I think three witnesses that have to go on Friday, but all of the other 11 from the 14 could probably go tomorrow.
THE COURT: Okay. Do you think we'll be able to fill up the day tomorrow?
03:23 MR. LASKE: Yeah. We'll be able to fill up the day.

THE COURT: Okay. Good. I'll see you at 3:40 then.

MR CHAMBERS: Thank you, Your Honor.

THE COURT: By the way, plaintiffs are at 8 hours 25 minutes. Defendants are at 2 hours 25 minutes.

(Recess ensued from 3:23 to 3:40 p.m.)

(See next volume for the rest of proceedings for the day.)

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C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

DATED: March 1, 2017, at San Diego, California.

/s/ Melinda S. Setterman

Melinda S. Setterman,
Registered Professional Reporter
Certified Realtime Reporter